

SEP 14 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DIEGO AGUILAR-HERRERA,

Defendant - Appellant.

No. 05-50971

D.C. No. CR-05-00287-MJL

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Submitted September 11, 2006**

Before: PREGERSON, T. G. NELSON, and GRABER, Circuit Judges

Diego Aguilar-Herrera appeals the sentence imposed following his guilty plea to being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Aguilar-Herrera contends that the district court erred in making an upward adjustment under U.S.S.G. § 2L1.2(b)(1)(A) and in sentencing him pursuant to 8 U.S.C. § 1326(b)(2) to more than the two-year statutory maximum set forth in § 1326(a) when, the indictment did not allege, he did not admit, and a jury did not find any prior conviction. He argues that the doctrine of constitutional avoidance requires that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), be limited to the holding that a prior conviction that increases the maximum penalty need not be alleged in the indictment when the prior conviction, unlike here, is admitted as part of a guilty plea. He also contends that intervening Supreme Court decisions have overruled *Almendarez-Torres* and this court's decisions interpreting *Almendarez-Torres* to allow sentence increases upon a judicial finding of the fact of a prior conviction. These contentions are foreclosed. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

AFFIRMED.